Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1997

James W. Coleman, Ph.D.
Petitioner

v.

Joseph E. Seagram & Sons, Inc.
Respondent

On Petition For Writ Of Certiorari
To The United Court of Appeals
For
The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES W. COLEMAN
PETITIONER *PRO SE*
8622 BLACKPOOL DRIVE
LOUISVILLE, KY 40222
(502) 426-5815

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15 pp

1. Whether petitioner's Constitutional rights were violated as they pertain to the discovery problems connected with material facts as discussed herein.

2. Petitioner alleged that respondent's higher-level managers wrote racist statements in his promotability evaluations. He was alleged that respondent artificially crafted at least one of petitioner's promotability evaluations in a manner in anticipation of his filing a Title VII lawsuit.

Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not order enforcement of the lower court's **discovery Order** compelling the respondent to produce a copy of the remainder of petitioner's own personnel file.

3. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not order enforcement of the lower court's **discovery Orders** compelling the respondent to produce the specific job-performance evaluations on the respondent's named Caucasian employees which a magistrate judge found in the possession of the respondent and which pertain to a material fact.

4. Whether the Sixth Circuit applied the wrong law to the issue concerning abuse of discretion for lack of enforcement of lower court's **discovery Orders**.

5. Whether the Sixth Circuit abused when it did not require imposition of sanctions against respondent since a finding of fact was made that it was "knowingly" withholding material documents.

6. Counsel for the parties had signed a written agreement stating that any requested documents containing confidential business information would be filed for an In Camera inspection.

Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue that respondent, prior to production, unilaterally redacted job-related documents pertaining to a material fact.

7. Whether the Sixth Circuit departed from the accepted and usual course of judicial proceedings relating to the sequence of discovery and entertaining respondent's motions for summary judgment.

8. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of the district court ruling on petitioner's discovery motions and granting respondent summary judgment all on the same day.

9. Whether the decision of the Sixth Circuit was arbitrary and capricious when it stated that the respondent moved

for summary judgment on petitioner's claims for constructive discharge and failure to promote **after** the district court had made its ultimate ruling on the discovery disputes.

10. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of the district court entertaining respondent's motion for summary judgment on petitioner's claim of constructive discharge while petitioner's supporting claims of retaliatory acts and subjection to different job performance standards were still viable.

11. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of subjection to different job-performance standards as one of the supporting claims for the constructive discharge claim.

12. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of the district court denying petitioner's motion to discover certain of respondent's written personnel policy and procedural documents covering petitioner's last two years of employment with the respondent.

13. Whether the Sixth Circuit abused its discretion when it did not address the specific issue of tolling the

statute limitations to grant leave of court to allow amending the complaint to include damages for intangible injuries, under the Kentucky Civil Rights Act, because of the nonproduction of the remainder of petitioner's own personnel file.

14. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address of the issue the district court forcing petitioner to trial on his claims for failure to promote and retaliatory acts without the benefit of the discovery referred to in Paragraphs 2, 3, 6, and 12, above.

15. Whether petitioner was fatally prejudiced at trial because the district court, with ultimate approval by the Sixth Circuit, did not enforce its **discovery Orders**, and permit discovery of respondent's personnel documents (Paragraph 12, above).

16. The instant case is of exceptional public interest in the civil-rights community in light of the much publicized case involving Texaco.

Whether the decision of the Sixth Circuit concerning the discovery Orders is likely to have a chilling and deterring effect on nonparties who may wish to redress their grievances under Title VII.

TABLE OF CONTENT

Page

QUESTIONS PRESENTED FOR REVIEW.....i-iv

TABLE OF CONTENT.....vi-viii

TABLE OF AUTHORITIES.....ix-xi

DATES OF ORDERS FOR REVIEW.....xi

JURISDICTION.....xii

STATUTORY PROVISIONS INVOLVED...xiii-xiv

STATEMENT OF THE CASE.....1

ARGUMENT.....7

Introduction.....7

I. THE SIXTH CIRCUIT ABUSED ITS DISCRETION AND COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GAVE JUDICIAL APPROVAL OF SEAGRAM'S NONCOMPLIANCE WITH THE DISCOVERY ORDERS, I.E., NOT PRODUCING ANY OF THE JOB-PERFORMANCE EVALUATIONS WHICH PERTAIN TO A MATERIAL FACT AND WHICH A MAGISTRATE JUDGE FOUND IN SEAGRAM'S POSSESSION.....8

II. THE SIXTH CIRCUIT CLEARLY ABUSED ITS DISCRETION WHEN IT FAILED TO ADDRESS THE ISSUE OF SEAGRAM, PRIOR TO PRODUCTION, REDACTING DISCOVERABLE JOB-RELATED DOCUMENTS WHICH PERTAIN TO A MATERIAL FACT.....17

III. THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT REFUSED TO ADDRESS THE ISSUE OF THE DISTRICT COURT NOT ALLOWING ME TO DISCOVER CERTAIN OF SEAGRAM'S PERSONNEL POLICIES AND PROCEDURES GOVERNING ITS EMPLOYEES AFTER 1983.....18

IV. THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT APPROVED MY BEING DENIED LEAVE OF COURT TO AMEND MY COMPLAINT TO INCLUDE RECOVERY OF DAMAGES FOR INTANGIBLE INJURIES UNDER THE KENTUCKY CIVIL RIGHTS ACT, AND WHEN IT REFUSED TO ADDRESS THE SPECIFIC ISSUE OF TOLLING THE STATUTE BECAUSE SEAGRAM WILLFULLY CONCEALED MATERIAL FACTS.....19

V. THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS....22

VI. THE SIXTH CIRCUIT ABUSED ITS POWERS AND COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GAVE JUDICIAL APPROVAL OF MY BEING FORCED TO TRY TO RESIST SUMMARY JUDGMENT AND TO TRY TO CARRY MY BURDENS AT TRIAL WITHOUT THE BENEFIT OF ANY OF THE COURT-ORDERED JOB-PERFORMANCE EVALUATIONS PERTAINING TO MATERIAL FACTS.....24

VII. THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT REFUSED TO ADDRESS THE ISSUE OF THE DISTRICT COURT DISMISSAL OF MY CLAIM FOR CONSTRUCTIVE DISCHARGE WHILE THE THREE SUPPORTING CLAIMS WERE STILL VIABLE, AND DISMISSAL OF THE WHOLE CASE WITHOUT DEALING WITH MY CLAIM FOR SUBJECTION TO DIFFERENT JOB STANDARDS.....27

VIII. THE INSTANT CASE IS OF EXCEPTION PUBLIC INTEREST IN THE CIVIL-RIGHTS COMMUNITY BECAUSE OF THE UNWILLINGNESS OF THE COURT TO ENFORCE ITS DISCOVERY ORDERS.....28

CONCLUSION.....29

APPENDIX A-1 - A-7

ORDERS FOR REVIEW

The Order sought to be reviewed was entered on October 31, 1996.

The Order denying petition for rehearing was entered on December 12, 1996.

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).....22

Bailey v. Glover, 88 U.S. 342 (1874)..21

Bruhwiler v. Univ. of Tennessee, 859 F.2d 419 (6th Cir. 1988).....26

Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986).....18, 22, 23

Christopher v. Strouder Memorial Hospital, 936 F.2d 870, 877 (6th) Cir.), cert. denied, __ U.S. __, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991).....25

Conley v. Gibson, 355 U.S. 41, 48 (1960).....20

Foman v. Davis 371 U. S. 178, 182 (1962).....20

General Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1130 (6th Cir. 1990)...20

Holmberg v. Armbrect, 327 U.S. 392 (1946).....21

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1989).....22

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).....7, 25

Mitchell v. Seaboard Systems, Inc., 883 F.2d 451, 454 (6th Cir. 1990)...20

Pearson v. Macon-Bibb County Hosp. Auth., 952 F.2d 1274 (11th Cir 1992)..21

Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190, 1196 (6th Cir. 1995), *cert. denied.* 116 S.Ct. 1546 (1996).....15

Scheerer v. Rose State College, 950 F.2d 661 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2995 (1992).....21

St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747-48 (1993).....25

Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989).....23

Terbovitz v. Fiscal Court, 825 F.2d 111, 114-115 (6th Cir. 1987).....25

Texas Dept't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981)..25

Trans World Airlines, Inc., v. Thurston, 469 U.S. 111, 121 (1985)....25

Yates v. AVCO Corp., 810 F.2d 630, 636 (6th Cir. 1987).....26

STATUTES AND RULES

28 U.S.C. ss636(b)(1)(A).....4, 5

28 U.S.C. ss1331.....6

42 U.S.C. ss2000e-2(a) (1988).....7

42 U.S.C. ss2000e-3(a) (1988).....7

Kentucky Civil Rights, Ky. Rev. Stat. ss344.450.....4, 7, 20

Fed.R.Civ.P. 15.....21

Fed.R.Civ.P. 26(b).....9

Fed.R.Civ.P. 34.....

Fed.R.Civ.P. 37(d)(2).....9

Fed.R.Civ. P. 52(a).....

JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the Order in question is 28 U.S.C. ss1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. @ 2000e-2(1) provides:

> It shall be an unlawful employment practice for an an employer--to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or pivileges of employment, because of such individual's race, religion, sex, or national origin.

Section 704(a) of the Civil rights Act of 1964, 42 U.S.C. @ 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an

> investigation, proceeding, or hearing under this subchapter.

Kentucky Revised Statute, ss344.450 provides:

> Any person deeming himself injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

Title VII plaintiffs in Kentucky, under Ky. Rev. Stat. ss344.450, are permitted to recover damages for intangible injuries such as humiliation, embarrassment, and mental and emotional distress. Mitchell v. Seaboard Systems, Inc., 883 F.2d 451, 454 (6th Cir. 1990).

STATEMENT OF THE CASE

Petitioner James W. Coleman, proceeding pro se, is an African American who is a citizen of the United States and resides in the Commonwealth of Kentucky, and was employed by respondent Joseph E. Seagram & Sons, Inc., ("Seagram" or "company") for over 21 years. I was employed as a senior research scientist in Seagram's biotechnology section in its research and development ("R&D") department then located in Louisville, Kentucky. I have a Ph.D. degree in microbiology, the requisite degree for the job at issue. Further, I was a long-time activist in the civil-rights movement related to equal employment opportunities.

During the early part of 1984, Dr. Frederick Weber, then my immediate supervisor and head of Seagram's biotechnology section, announced his intent to retire when he reached his 62nd birthday in February 1985. On the basis of my time with the company, my academic degree, my job grade, my job performance which always had been above management's expectation, and Seagram's past practices, I thought that I was next in line to head the biotechnology section and the most logical choice for it. Based on Seagram's past practices, shortly after Dr. Weber's announced intent to retire, I would have been promoted to head the biotechnology section. Also based on Seagram's past practices, for the purposes of training and business continuity, Dr. Weber and I

would have been in the **same** section head position at the **same** time.

Based on my sworn testimony, shortly after Dr. Weber announcement about retirement, he told me that Dr. Leslie Bluhm, then Seagram's decision-maker and vice-president of the R&D department, was forcing him to craft my promotability evaluation for 1984 in a manner in anticipation of my filing a Title VII lawsuit. Further, I swore under oath that in the spring of 1985 Dr. Weber told me that Dr. Bluhm had written racist statements in my 1985 promotability evaluation related to my potential for career advancement. I also swore under oath that over the years Dr. Weber told me that other upper-level managers in the Seagram organization routinely wrote racist statements in the confidential section of my promotability evaluations after they had been shown to me. I finally swore under that I had personally seen racist statements which had been written in the nonconfidential section of my job-performance evaluation.

By March 1985 with no one offering me the position as the next head of the biotechnology section, I went through three tiers of Seagram's management in unsuccessful attempts to gain access to my complete personnel file. I was shown **copies** of a few documents but never the complete file. I also requested, in writing, permission to examine my promotability evaluations specifically. Seagram denied my request.

Dr. Weber retired at the end of July 1985. Thereafter, an employee with a high school diploma assumed the job responsibilities previously performed by Dr. Weber. In mid-August 1985, Seagram announced that Dr. Albert Bronsky, who was Caucasian, had been selected as the interim head of the biotechnology section. I then gave written notice that I would involuntarily separate from the company effective August 31, 1985, stating that I could no longer tolerate the company's unrelenting racist policies and practices which were directed at me.

After I received my "letter of right to sue" from the Equal Employment Opportunity Commission in October 1986, the instant lawsuit was instituted on January 12, 1987 in the United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-87-0022. I alleged in my sworn Complaint that Seagram (i) failed to promote me because of my black race, (ii) intentionally perpetrated retaliatory acts against me because of my opposition to the company's racist policies, procedures and practices, (iii) intentionally and continuously subjected me, because of my black race, to job-performance standards which were materially different from those applied to my Caucasian co-workers, and (iv) created, by the three elements above, a hostile and intolerable work environment which caused my constructive discharge. Pet. App. A-1.

I am also seeking to amend my original Complaint to include damages for intangible injuries for embarrassment, humiliation and mental anguish under the Kentucky Civil Rights Act, Ky. Rev. Stat. ss344.450.

In April 1988, I requested Seagram to produce, among other things, a copy of my complete personnel file. Seagram produced some documents, but none of my promotability evaluations covering my last 12 years with the company, (except only selected pages for the last two years, infra.) On November 30, 1990, a magistrate judge, proceeding pursuant to 28 U.S.C. 636(b)(1)(A), ordered Seagram, to produce copies of the remainder of my personnel file if it has or discovers any additional documents. Pet. App. A-2. On April 1991, I requested Seagram to produce, among other things, copies of specific job-performance evaluations on certain Caucasian employees, covering the period between 1965 and 1985 when these Caucasian employees worked with me in Seagram's R&D department.

In its **discovery Order** of February 3, 1993, a magistrate judge, acting pursuant to 28 U.S.C. ss636(b)(1)(A), made a finding of fact that Seagram was **"knowingly"** refusing to produce the job-performance evaluations in its possession on certain Caucasian employees. Pet. App. A-3. On or about May 24, 1993, the respondent filed its motion for summary judgment on my claims for constructive discharge and failure to promote. Record 96. On June 11, 1993, the same

magistrate judge, acting pursuant to 28 U.S.C. ss636(b)(1)(A), ordered Seagram to produce for inspection the specific job-performance evaluations on named Caucasian employees. Pet. App. A-4. At the inspection, Seagram did not produce **any** of the job-performance evaluations covered under the June 11, 1993 **discovery Order**.

On August 9, 1993, I moved the district court to impose sanctions against the respondent for not producing any job-performance evaluations covered under the **discovery Orders** of February 3, 1993 (Pet. App. A-3) and June 11, 1993 (Pet. App. A-4). On March 31, 1994, the trial court denied my motion to impose sanctions against Seagram for these nonproductions. Pet. App. A-5. Also on the same day of March 31, 1994, the trial court dismissed my claims for constructive discharge and failure to promote at the summary judgment stage. Record 117. On May 17, 1994, I moved for reconsideration on my claim for failure to promote. Record 120. On or about June 13, 1994, the respondent moved for summary judgment on my claim for retaliatory acts. Record 123.

On April 11, 1995, my claim for failure to promoted was reinstated, and respondent's summary judgment motion on my claim for retaliatory acts was denied. Record 144. With all three of the supporting elements (failure to promote, retaliatory acts, and subjection to different job performance standards) of my claim for constructive discharge now

viable, I then moved for reconsideration of the claim for constructive discharge. Record 146. The case proceeded to trial only on my claims for failure to promote and retaliatory acts which were dismissed thereafter on June 27, 1995, stating that I did not establish a prima facie case. Record 174. My motion for reconsideration of my claim for constructive discharge was denied about five minutes before trial began. Record 190. My claim for subjection to different job standards was never addressed. After all my pretrial motions were denied on December 15, 1995. My pro se notice of appeal was filed timely on January 10, 1996 to the United States Court of Appeals for the Sixth Circuit followed. Record 186. My pro se appeal was dismissed on October 31, 1996, affirming the judgment of the district court. Pet. App. A-6. My pro se petition for rehearing was denied on December 12, 1996. Pet. App. A-7. This timely pro se petition for writ of certiorari was filed by mailing on March 5, 1997.

JURISDICTION OF FIRST INSTANCE

Federal subject matter jurisdiction in the first instance exists pursuant to 28 U.S.C. ss1331.

ARGUMENT

Introduction

Section 2000e-2(a) of Title VII provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race ...." 42 U.S.C. ss2000e-2(a) (1988).

Section 2000e-3(a) of Title VII provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of its employees ... because [the employee] has opposed any practice made an unlawful practice by this subchapter, or because he had made a charge, testified, assisted, or otherwise participated in any manner in an investigation, proceeding, hearing under subchapter." 42 U.S.C. ss2000-3(A) (1988).

Title VII plaintiffs in Kentucky, under Ky. Rev. Stat. ss344.450, are permitted to recover damages for intangible injuries such as humiliation, embarrassment, and mental and emotional distress. Mitchell v. Seaboard Systems, Inc., 883 F.2d 451, 454 (6th Cir. 1990).

I.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION AND COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GAVE JUDICIAL APPROVAL OF SEAGRAM'S NONCOMPLIANCE WITH THE DISCOVERY ORDERS, I.E., NOT PRODUCING ANY OF THE JOB-PERFORMANCE EVALUATIONS WHICH PERTAIN TO MATERIAL FACTS AND WHICH A MAGISTRATE JUDGE FOUND IN SEAGRAM'S POSSESSION.

Congress placed the ultimate burden of persuasion on the plaintiff to prove his or her case in a Title VII action. Even in a Title VII action involving only one plaintiff (as is true in the instant lawsuit), Congress reasoned that this was not too burdensome for a lone Title VII plaintiff because of the liberal discovery rule in any federal court, because the plaintiff may discover documents in the possession of the defendant. It also was the clear intent of Congress for the liberal discovery rule to apply to African-American plaintiffs equally. For obvious reasons, most lone Title VII plaintiffs in my shoes must rely on the documents in the possession of the employer to establish a *prima facie* case and to carry their ultimate burdens at trial. A Title VII plaintiff may discover the documents in the possession of the employer under Rule 34 of the Federal Rule of Civil Procedure.

Rule 34 provides, in pertinent part:

> Any party may serve on any other party a request (1) to produce and permit the party

> making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents ... which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

Rule 26(b) provides, in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery.

If the request is refused, a party may apply for an Order compelling discovery, Rule 37, Federal Rules of Civil Procedure. To prepare my case (on all claims) and plan my strategy of trial, I tried to discover the job-performance evaluations pertaining to my promotability and potential for career advancement. For use in a comparative analysis, I also tried to discover the promotability evaluations on certain of my Caucasian co-workers who, like me, also had a Ph.D. degree and worked in my same unit. For the same purpose, I also made attempts to discover the job-performance evaluations of certain other Caucasian employees who had only a bachelor's or master's degree and were promoted or not promoted to a section head position which was the same as or

equivalent to the section head position which I was seeking.

The undisputed facts are that Seagram used two basic types of forms to evaluate the job performance of all its employees, including me, in its R&D department in Louisville, Kentucky. One form was used to rate the employee for salary increases. A second and different form was used to rate and assess an employee's promotability and potential for career advancement. The discovery of the promotability evaluations was of particular relevance in connection with the claim for failure to promote, and to discover direct evidence of racial animus.

Seagram's promotability form which was in use during my last five years of employment with the company was titled Development Review, but has been commonly referred to by the parties throughout these proceedings as the "blue book" because it has a blue cover. The "blue book" is an eight-page, bound document. In response to my request for a copy of my personnel file, Seagram stated in writing that it was providing copies of "... certain performance evaluations of plaintiff (except for privileged documents) ...." Record 12.

After a magistrate judge's **Order** was entered compelling Seagram to produce copies of "any remaining documents" in its possession on my job-performance, Seagram has never disputed the fact that it has never produced any of my

promotability evaluations covering my last 12 years of employment with the company. These missing promotability evaluations are in Seagram's possession as evidenced by a finding of fact made by a magistrate judge that no job-performance documents have been destroyed, *infra*. Additionally, Seagram has never disputed the fact that it has never produced **first six (6) pages of my promotability evaluations (i.e., "blue books") for either 1984 or 1985**--my last two years with the company. The ultimate decision of the Sixth Circuit to allow Seagram to abuse the discovery process by withholding my promotability evaluations under a scheme of "privileged documents" is clearly erroneous, and I was fatally prejudiced by this error.

Regarding the Caucasian employees, the specific job-performance evaluations which were covered in the **discovery Order** included "'bluebook" performance appraisals, performance summary forms, supervisor notes, merit review ratings, development review and performance plan and assessment summaries, position description questionnaires, management incentive plan, letters of recommendation, and complimentary or disciplinary letters.'" Pet. App. A-4, p. 6. Seagram's Caucasian employees named in this **discovery Order** compelling production included Drs. Richard Bailey, Edward Ruf, Weldon Maisch, Albert Bronsky, Frederick Weber, James Wolfram and Ronald Wagener, and Ms. Joan Wathen and Messrs. Frank Luther, Clifford Bosworth, Jack Sanders, Tom Coffey, and

Richard Panek. *Id.* The 'findings of fact' in the **discovery Orders** read, in pertinent parts:

> First, "'[Seagram's] vice - president and custodian of personnel files, Robert Cherundolo, testified that: Whatever forms were completed, we have them .... No forms have been destroyed. Whether I call[ed] it the right name or not, they're in the employee personnel file, bluebook file, or in our records warehouse or what have you. There is no reason to destroy any files that reflect the performance of an individual."' Pet. App. A-3, p. 7, 8; and A-4, p. 5.
>
> Second, "'It is apparent that the requested personnel performance documents of the Caucasian Ph.D.'s in the R&D department (Drs. Ruf, Bailey, Wagener, Maisch, Weber, Br[o]nsky, Wolfram, and Baldwin) do exist, and are in the possession of ...[Seagram], as admitted by the testimony of its vice-president. Plaintiff is plainly entitled to these documents and similar documents relating to the Caucasian co-workers with master's or bachelor's degrees (Coffey, Panek, Scalf, Sanders, and Bosworth.)"' Pet. App. A-3, p. 8.
>
> Third, "'...[Seagram] has **knowingly** refused to produce them [i.e., the job-performance evaluations specified above] in violation of its prior [written] negotiated agreement with [me]."'

Pet. App. A-3, p. 7. (emphasis added).

Seagram has admitted that it did not produce any additional documents after the **discovery Orders** were entered. Seagram has never stated under oath that the requested documents are not in its possession, custody or control. Further, Seagram has never disputed the fact it has never produced even one job-performance evaluation on 11 of the 13 Caucasian employees who were named in the **discovery Orders**. These 11 employees alone had a combined total of over 90 years of employment in the company's R&D department during the time frame of the initial request. For the remaining two Caucasian employees, Seagram produced a total of only 23 pages of documents even though these two employees had a combined total of over 25 years of employment in the company's R&D department during this period. Of the 23 pages produced, two pages had been unilaterally redacted prior to production, *infra*. Considering the findings of fact by the magistrate judge that "[n]o forms have been destroyed," the magnitude of the nonproduced job-performance evaluations on the 13 Caucasian employees is well outside the bounds of reason.

Despite the dearth of production together with the findings of fact by the magistrate judge that Seagram is **"knowingly"** withholding the requested job-performance evaluations which are in its possession and which pertain to material facts, the district court on

March 31, 1994 declined to impose sanctions against the company for noncompliance with the discovery Orders, supra. The district court instead stated in its Order that "A review of the record convinces [the district] court that [Seagram] has made every effort to comply with [my] discovery requests...." Pet. App. A-5, para. 3. The rules of discovery (as did the **discovery Orders**) require a party to produce material documents which are in its possession, not just make "every effort to comply." Rules 26(f) and 34 of the Fed.R.Civ.P.

When I raised the issue of this error of law on appeal, the Sixth Circuit then arbitrarily and capriciously manufactured a new fact by stating that: "[T]he district court ultimately determined that Seagram had complied fully with [my] discovery requests." Pet. App. A-6, p. 2. There is no such determination in the record. For the Sixth Circuit to let Seagram get away with not producing material documents which the magistrate judge found in Seagram's possession is a clear abuse of discretion, contrary to the rule of discovery and the clear intent of Congress, and it is clearly erroneous. If the Sixth Circuit is upheld, then an alleged wrongdoer, such as Seagram, with **court-ordered**, material documents in its possession could escape Title VII liability simply by making "every effort to comply" with the **discovery Orders**.

It is fair and reasonable to conclude that I was fatally prejudiced

because the **discovery Orders** pertaining to material facts were not enforced by the Sixth Circuit. I know of no published authority which would allow a party to prevail who **"knowingly"** refused to produce **court-ordered** job-performance evaluations which (i) "do exist;" (ii) "are in the possession of..." the employer; and (iii) pertain to material facts, *supra*.

In its Order, the Sixth Circuit stated that "...we find no abuse of discretion in the district court's ruling on discovery, citing Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190, 1196 (6th Cir. 1995), *cert. denied.* 116 S.Ct. 1546 (1996). The Sixth Circuit offered no discussion to explain the basis for its decision. In any event, the Plott decision in a five-part conjunctive test which set forth the relevant factors for review under an abuse of discretion standard: (i) when the appellant learned of the issue; (ii) whether the desired discovery would have changed the rulings; (iii) how long discovery lasted; (iv) whether the appellant was dilatory is his discovery efforts, and (v) the responsiveness of the appellee to discovery requests. Plott, 71 F.3d at 1196-97.

The Plott decision relates to discovery requests, while my specific issue pertains to the district court's nonenforcement of its **discovery Orders**. This is a different issue. If the "district court ultimately determined that Seagram had complied fully with [my]

discovery requests" as the Sixth Circuit arbitrarily contends, *supra,* then it made no sense at all to apply Plott. I know of no published authority which allows an appellate court to transform a material fact to fix existing law. Clearly, the Sixth Circuit applied the wrong law to my particular situation. The appropriate law would be the imposition of sanctions under Rule 37(d)(2) Fed.R.Civ.P. as set out in my motion for sanctions against Seagram. Record 103. Further, my motion for sanctions was before the district court more than seven (7) months before it granted summary judgment to Seagram. The district court committed clear error when it ruled on this motion and granted Seagram summary judgment all on the same day.

In 1857, this Court ruled that a slave is not a legal person. Black men, women and children could be bought and sold. In a later decision, this Court ruled that a black person was only 3/5th human and hence not equal to a white person. In the case at bar, depriving me of the benefit of the **court-ordered discovery** by the Sixth Circuit in essence is a throw-back to "Jim Crowism" in that a black person is not wholly legal yet and, therefore, not entitled to examine lawsuit documents which are maintained on certain white people. This is the only conclusion that I can draw.

In one of its recent opinions, this Court wrote that America's goal is to achieve a "colorblind society." Surely then, fairness and equal justice in the

judicial system must be an essential element toward achieving that goal. This is my last avenue for fairness and justice to prevail to restore my Constitutional rights. I sincerely hope that this Court has the courage to exercise its supervisory powers and affirmative duty and do the right thing in the present case. Clearly, I am entitled to a fair and equitable remedy in the instant lawsuit.

II.

THE SIXTH CIRCUIT CLEARLY ABUSED ITS DISCRETION WHEN IT FAILED TO ADDRESS THE ISSUE OF SEAGRAM, PRIOR TO PRODUCTION, REDACTING DISCOVERABLE JOB-RELATED DOCUMENTS WHICH PERTAIN TO A MATERIAL FACT.

To attempt to corroborate one of my allegations about retaliatory acts, I finally tried unsuccessfully to discover copies of the text of job-related documents, pertaining to a material fact, on two of my Caucasian co-workers who were involved in a research project with me, Jan Chipman and Panek. Seagram has never disputed the fact, and has in essence admitted, that it unilaterally redacted the requested documents prior to production. Additionally, Seagram has never disputed the fact that counsel for both parties signed a written agreement, with is part of the Record, stipulating that any requested document containing confidential information would be filed for an In Camera inspection. Further, Seagram has never disputed fact that it has neither produced any of these

documents unredacted nor filed any documents for an In Camera inspection.

The Sixth Circuit abused its discretion and committed reversible error when it refused to address the issue of Seagram's concealing material evidence by redacting these documents. By its silence, the Sixth Circuit in essence gave judicial approval to creating the absence of a material fact through redacting. A party may not create the absence of a genuine issue of material fact by concealing evidence. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This also is in clear violation of Rule 34 of the Federal Rules of Civil Procedure, and the clear intent of Congress. I know of no published authority which would allow a party to prevail who willfully conceals material evidence by redacting. A review is therefore required in the interest of justice.

III.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT REFUSED TO ADDRESS THE ISSUE OF THE DISTRICT COURT NOT ALLOWING ME TO DISCOVER CERTAIN OF SEAGRAM'S PERSONNEL POLICIES AND PROCEDURES GOVERNING ITS EMPLOYEES, INCLUDING ME, AFTER 1983 .

It is well-established law that the employer's personnel procedural policies is the contract between the company and its employees. A copy of the physical contract is fundamental and requisite in this type of lawsuit to document the relationship between the parties. For this purpose, I tried unsuccessfully to

discover a copy of the written policy and procedural guidelines which Seagram used to govern its employees during my last two (2) years of employment with the company. Specifically, I was attempting to discover Seagram's written policies and procedures pertaining to promotability, promotions and its "internal / external search" process to fill existing and projected job vacancies. Moreover, these documents are relevant because I alleged in my original Complaint that Seagram intentionally applied specific personnel policies in a racially discriminatory manner. Pet. App. A-1. para. 8, 10. The district court denied my motion to compel discovery. Further, the district court failed to rule on my motion to reconsider. The discovery of these documents is essential to my case and I was substantially prejudiced without them. This issue of not being allowed to discover these procedural documents was raised on appeal. The Sixth Circuit abused its discretion by refusing to address this specific issue.

IV.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT APPROVED MY BEING DENIED LEAVE OF COURT TO AMEND MY COMPLAINT TO INCLUDE RECOVERY OF DAMAGES FOR INTANGIBLE INJURIES UNDER THE KENTUCKY CIVIL RIGHTS ACT, AND WHEN IT REFUSED TO ADDRESS THE SPECIFIC ISSUE OF TOLLING THE STATUTE BECAUSE SEAGRAM WILLFULLY CONCEALED MATERIAL FACTS.

It is commonplace for litigants to amend their original complaints under

Rule 15 of the Federal Rules of Civil Procedure to conform with newly discovered evidence, and with new law when applicable. This Court has held that the decision to allow plaintiffs to amend their complaints should be liberally granted in the absence of undue delay, bad faith, undue prejudice, or futility of amendment. Foman v. Davis 371 U. S. 178, 182 (1962). See also General Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1130 (6th Cir. 1990).

Damages for intangible injuries were not available in federal court for Title VII plaintiffs in 1987 when the instant lawsuit was filed. However, Kentucky plaintiffs could amend their Title VII complaints in federal court to recover damages for intangible injuries under the Kentucky Revised Statutes for the first time in 1989. Ky. Rev. Stat. ss344.450; and Mitchell at 454. The statute of limitations is five years. My motion to amend my original Complaint was filed in April 1992 more than five years after the date of incident, but less than three years after the law became effective. The spirit of a statute is not to short circuit a plaintiff's right based on a mere technicality. Proper application should be based on the merit, Conley v. Gibson, 355 U.S. 41, 48 (1960). In the present case, I would have to win the underlying case before damages for intangible injuries could be applied anyway. Common sense law tells us that if the underlying case proves to be meritorious, then damages for intangible injuries should necessarily flow from it.

Therefore, a defendant would not be prejudiced by a mere technicality of alleged tardiness of this type of amendment.

Further, this Court has allowed the statutory filing period to be tolled if the employer fraudulently conceals discoverable documents. Bailey v. Glover, 88 U.S. 342 (1874); and Holmberg v. Armbrect, 327 U.S. 392 (1946). Lower courts have tolled the 180-day statutory period of limitations due to concealment violations in Title VII cases. Scheerer v. Rose State College, 950 F.2d 661 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2995 (1992); and Pearson v. Macon-Bibb County Hosp. Auth., 952 F.2d 1274 (11th Cir 1992). Accordingly, the statute of limitations cannot begin until the concealment ends as a matter of law.

Since Seagram had not produced my complete personnel file (willfully or negligently) and since the magistrate judge made a finding of fact that no job-performance evaluations had been destroyed and are within Seagram's possession, the same principle of tolling the statute of limitations should apply here based on concealment. It was clear error not to allow me to discover my complete personnel file first, and then amend my original Complaint to conform to the facts. Fed.R.Civ.P. Rule 15.

While I knew that I had suffered intangible injuries, but my hurt feelings may not be statutory actionable, or, the instant case may also be actionable, in

part, under a different statute. It makes sense, therefore, to discover the facts first. In any event, the statute of limitations should not begin to run until Seagram relinquishes the remainder of my personnel file

The Sixth Circuit refused to address the specific issue of Seagram concealing substantial portions of my personnel file by a scheme of a "privileged documents" designation, *supra.* Any perceived prejudice to Seagram was brought on by Seagram's own recalcitrance regarding nonprodouction. Withal, the Sixth Circuit abused its powers by not allowing me to file of record my amended Complaint. A review is warranted in the interest of fairness and justice.

V.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS .

In its 1985-86 term this Court issued three landmark decisions giving district courts great latitude and discretion in disposing of cases by way of summary judgment when there is no genuine issue of material fact, Fed.R.Civ.P. 56(c). The authorities which govern summary judgment in federal court are Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Celotex, 477 U.S. at 317, 323 (1986); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586 (1986). The Sixth Circuit has adopted this new

summary judgment practice, Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989).

When viewed in harmony with each other, a fair and reasonable reading of these authorities is that a district court should not entertain a motion for summary judgment before the plaintiff has had a full and fair opportunity to conduct adequate discovery. Further, a fair and reasonable interpretation of the phrase "full and fair opportunity" to conduct "adequate discovery" does not mean the mere passage of time. Rather, it means timely request and **actual** production of the requested documents pertaining to material facts which are in the possession of the defendant. The opposing party cannot create the absence of genuine issue of material fact by nonproduction (and **redacting**, supra.) of documentary evidence. Celotex Corp., 477 U.S. at 323.

A fair and reasonable interpretation of the authorities governing discovery and summary judgment is that the nonmoving party should have the benefit of the court's discovery rulings before responding to any motion for summary judgment.

In the present case, I had filed motions to compel discovery before Seagram moved for summary judgment for the first time. I also had a motion for sanctions for noncompliance with the **discovery Orders** before the district court entertained Seagram's first motion

for summary judgment on my claims for constructive discharge and failure to promote. The district court denied all of my discovery motions and awarded summary judgment to Seagram on the same day. Clearly, this was a departure from the accepted and usual course of judicial proceedings.

In an obvious attempt to give the appearance that the district court had followed the accepted and usual judicial course of proceedings, the Sixth Circuit arbitrarily and capriciously stated that Seagram moved for summary judicial after the ruling on the discovery dispute had been made. Pet. App. A-6, p. 2. In truth and fact, Seagram moved for summary judgment 10 months **before** the district court made its final rulings on the discovery disputes. I was substantially, if not fatally, prejudiced by the district court's clear departure from what is the accepted, usual and logical in this regard, and by the approval of this error of law by the Sixth Circuit.

VI.

THE SIXTH CIRCUIT ABUSED ITS POWERS AND COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GAVE JUDICIAL APPROVAL OF MY BEING FORCED TO TRY TO RESIST SUMMARY JUDGMENT AND TO TRY TO CARRY MY BURDENS AT TRIAL WITHOUT THE BENEFIT OF ANY OF THE COURT-ORDERED JOB-PERFORMANCE EVALUATIONS PERTAINING TO MATERIAL FACTS .

A Title VII plaintiff may establish a *prima facie* case of discrimination by

showing the existence of circumstantial evidence to create an inference of discrimination by way of a four-part test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). A Title VII plaintiff may bypass the McDonnell test by presenting direct evidence of intentional discrimination by the defendant, Terbovitz v. Fiscal Court, 825 F.2d 111, 114-115 (6th Cir. 1987)(citing Trans World Airlines, Inc., v. Thurston, 469 U.S. 111, 121 (1985).

To survive thereafter, a plaintiff must also defeat any articulated legitimate, nondiscriminatory business reason for the adverse action, and then meet his ultimate burden of proof. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747-48 (1993); Texas Dept't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981).

A claim for retaliatory acts has the same sequence and burden of proof as above for failure to promote. However, a different four-part test is used to establish a *prima facie*. Christopher v. Strouder Memorial Hospital, 936 F.2d 870, 877 (6th) Cir.), cert. denied, __ U.S. __, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991). Again, the ultimate burden of persuasion remains with the plaintiff at all times.

The standards for constructive discharge in the Sixth Circuit have been well established: the employer created working conditions that were so "difficult or unpleasant" that a

reasonable employee in my shoes would feel compelled to resign. Yates v. AVCO Corp., 81[illegible] F.2d 630, 636 (6th Cir 1987).

The employer may create the "difficult or unpleasant" workplace environment by one incident of discrimination, if serious enough, or by multiple acts of discrimination done concurrently with each other. Bruhwiler v. Univ. of Tennessee, 859 F.2d 419 (6th Cir. 1988).

In the present case, for my constructive discharge claim I am proceeding under the principle of both single and concurrent, multiple incidents, i.e., failure to promote, retaliatory acts, and/or subjection to different job standards, *supra*. It is fair and reasonable to conclude that all these legal tests, standards and ultimate burdens of persuasion, as set forth above, are inherently based on the proposition that the plaintiff has had a fair and full opportunity to discover documents in the possession of the defendant which pertain to material facts. Without the benefit of the withheld court-ordered discovery at trial, the district court had to invoke Fed.R.Civ.P. 52(a) to make his evaluation based on oral testimony.

The district court forced me into the untenable position, which was approved by the Sixth Circuit, to try my case on oral testimony. This was unfair and unreasonable, and clearly erroneous because the lower courts programmed my

demise at trial when they did not enforce the **discovery Orders**, supra. My demise was compounded by the fact that I was not allowed to discover Seagram's personnel procedural documents covering my last two years with the company, *supra*. Obviously, I did not want to be forced into this posture as evidenced by my motions to compel discovery of documentary evidence, and my motion for sanctions. Accordingly, all the ruling adverse to me which occurred after nonenforcement of the **discovery Orders** were clearly erroneous. Surely, a review is warranted.

VII.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT REFUSED TO ADDRESS THE ISSUE OF THE DISTRICT COURT DISMISSAL OF MY CLAIM FOR CONSTRUCTIVE DISCHARGE WHILE THE THREE SUPPORTING CLAIMS WERE STILL VIABLE, AND DISMISSAL OF THE WHOLE CASE WITHOUT DEALING WITH MY CLAIM FOR SUBJECTION TO DIFFERENT JOB STANDARDS .

The supporting elements of my claim for constructive discharge included (i) failure to promote; (ii) retaliatory acts and subjection to job-performance standards which differed from my Caucasian counterparts. The district court dismissed my claim for constructive discharge while the latter two supporting claims were left standing. Clearly, the district court departed from a logical sequence of accepted and usual course of judicial proceedings. (This was like burning my house down before it was built.) It is fair and reasonable to

conclude that I was substantially if not fatally prejudiced by the district court's departure from the accepted order of proceedings. This issue was raised on appeal, but the Sixth Circuit refused to address this specific issue without comment. Further, the Sixth Circuit also refused to deal with the issue raised concerning the district court's dismissal of my whole case without addressing my claim for subjection to different job standards. This claim was made in my original Complaint at Paragraph 8 Pet. App. A-1

VIII.

THE INSTANT CASE IS OF EXCEPTION PUBLIC INTEREST IN THE CIVIL-RIGHTS COMMUNITY BECAUSE OF THE UNWILLINGNESS OF THE COURT TO ENFORCE ITS DISCOVERY ORDERS .

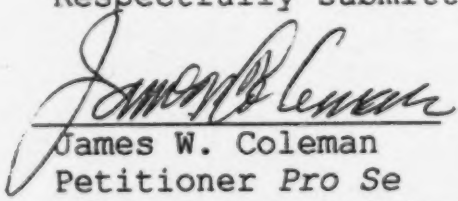
Since 1990, several national and local civil-rights organizations have been actively involved in the instant lawsuit. Over the years, they have sent letters to Seagram urging the company to relinquish the discoverable documents and let the case succeed or fail based on the documentary evidence. In printed circulations, the community has expressed a good faith belief that Seagram is hiding material evidence which is likely to prove every element of my case. After the Sixth Circuit issued its decision favoring Seagram's noncompliance with the discovery Orders, seven (7) local civil-rights groups and a city of Louisville, Kentucky official sent letters to federal authorities asking for a criminal probe into allegations of destroying or

withholding and concealing material evidence to obstruct justice. Considering the findings of fact, clearly the job-performance evaluations at issue are being withheld or were destroyed after the **discovery Orders** were entered. The civil-rights groups reasoned that if Seagram is allowed to destroy or withhold and conceal material evidence, this would have a chilling and deterring effect on nonparties who may wish to seek redress of their grievances under Title VII.

CONCLUSION

As discussed herein, my rights guaranteed under the United States Constitution have been violated. For all the foregoing reasons, I respectfully request that my petition for a review be **GRANTED**, and the case be reversed and remanded with instructions on discovery and for a trial on all issues.

Respectfully submitted,



James W. Coleman
Petitioner *Pro Se*
8622 Blackpool Drive
Louisville, KY 40222-5667
(502) 426-5815

APPENDIX A-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY

DR. JAMES W. COLEMAN
8622 Blackpool Drive
Louisville, Kentucky 40222

PLAINTIFF

VS. CIVIL ACTION NO. C-87-0022-L-B

JOSEPH E. SEAGRAM & SONS, INC.
SERVE: U.S. Corporation Company
600 West Main Street
Louisville, Kentucky 40202
Process Agent

DEFENDANT

COMPLAINT

I. JURISDICTIONAL STATEMENT

1. This is a suit and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 USC [ss] 2000 E, Et Seq. Jurisdiction of this Court is invoked pursuant to 42 USC, Et Seq., and 28 USC 1343 (4).

II. PRELIMINARY STATEMENT

2. The conditions pertaining to establishing jurisdiction of this Court have been complied with in that a charge of employment discrimination was filed

with the Equal Employment Opportunities Commission within ninety (90) days of commission of the unfair employment practice, on the 11th day of September, 1985. A notification of right to sue was issued by the Equal Employment Opportunities Commission on the 10th day of October, 1986, and further, this complaint has been filed within ninety (90) days of receipt of said notice of right to sue.

III. PARTIES

3. The Plaintiff, **DR. JAMES W. COLEMAN**, is a black male citizen of the United States, and of the Commonwealth of Kentucky, and resides at 8622 Blackpool Drive, Louisville, Kentucky.

4. The **JOSEPH E. SEAGRAM & SONS, INC.**, is a corporation, incorporated under the laws of the State of **INDIANA**, and is qualified and licensed to do business in the Commonwealth of Kentucky, and further said corporation is doing business within the confines of the State of Kentucky.

5. The unlawful employment practices alleged herein were committed within the confines of the Commonwealth of Kentucky.

VI. FACTUAL ALLEGATIONS

6. The plaintiff, a Black citizen of the United States residing in the Commonwealth of Kentucky, has been an employee of the defendant corporation.

And further, plaintiff has been denied equal employment opportunities by defendant solely because of his race and color.

7. During the period of employment, plaintiff states that he has been denied consideration for promotion on the basis of his race, and further, the company has refused to promote him to a supervisory position, in violation of existing company policy.

8. That the defendant has refused to maintain and utilize the same standards available to similarly situated white employees regarding promotion, and has failed to maintain the same standards and documentation to allow plaintiff's upward mobility in the defendant corporation solely on account of plaintiff's race.

9. Plaintiff further states that he has been overlooked for promotional opportunities because of his activities, and speaking out, and admonishing the defendant corporation for its discriminatory practice toward Blacks.

10. Plaintiff further states that he would have been entitled to a promotion to a supervisory position within the confines of the employment of defendant corporation, however, said position was denied to plaintiff and temporarily given to an individual with less seniority, and then awarded to another person, all in violation of prior company practice.

11. That as result of the discriminatory practice of defendant corporation, the plaintiff was forced to resign his position of employment on August 31, 1985.

WHEREFORE: The plaintiff, DR. JAMES W. COLEMAN, demands:

1. That the Court award the plaintiff compensatory damages, representing a earnings, wages, or any other benefits that he would have received but for the discriminatory practice of the defendant.

2. That the Court award the plaintiff the cost of this action including but not limited to a reasonable fee for attorney of record.

3. That the Court grant any other relief to which the plaintiff may be other wise properly entitled.

Respectfully submitted,

"/s/ James P. Green
JAMES P. GREEN
ATTORNEY FOR PLAINTIFF
606 WEST MUHAMMAD ALI BLVD.
SUITE 503
LOUISVILLE, KENTUCKY 40203
(502) 585-2374-5

"/S/ James W. Coleman
DR. JAMES W. COLEMAN,
PLAINTIFF

Comes now plaintiff, DR. JAMES W. COLEMAN, and states that he has read the foregoing Complaint and that the statements contained therein are true to the best of his knowledge and belief.

"/s/ James W. Coleman

DR. JAMES W. COLEMAN

Subscribed and sworn to before me by DR. JAMES W. COLEMAN this 8th day of January, 1987.

My Commission expires November 21, 1987.

"/s/ Jessie H. Tucker
Notary Public, State at Large Kentucky

APPENDIX A-2

UNITED STATED DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN

V. CIVIL ACTION NO. 87-0022-L(S)

JOSEPH E. SEAGRAM & SONS, INC.

MEMORANDUM OF PRETRIAL CONFERENCE AND ORDER

A pretrial conference was conducted by the Court on November 30, 1990. The plaintiff, Mr. James W. Coleman, appeared in person with retained counsel, Mr. William H. Allison, Jr. Mr. John W. Ohlweiler and Mr. Frank Chuppe appeared on behalf of the defendant, Joseph E. Seagram [&] Sons, Inc.

Counsel for the plaintiff requested all documents pertaining to plaintiff in defendant's files. Counsel for the defendant stated that copies of all documents in their possession had been given to the plaintiff.

Pursuant the provisions of Title 28 U.S.C. [ss] 636(b)(1)(A), and the Court being otherwise sufficiently advised,

IT IS THEREFORE ORDERED that if defendants have or discover any remaining documents, copies should be furnished to

plaintiff, except those that are considered privileged in this action.

Dated: November 30, 1990

"/s/ George J. Long
GEORGE J. LONG,
CHIEF, U.S. MAGISTRATE
UNITED STATES DISTRICT COURT

Copies: Counsel

ENTERED
DEC 03 1990
jesse w. grider,
clerk
by
deputy clerk
"/s/ K Numan

APPENDIX A-3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN, Ph.D.
PLAINTIFF

vs. CIVIL ACTION NO.
C87-0022-L(M)

JOSEPH E. SEAGRAM & SON[S, INC.]
DEFENDANT

ORDER

This matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. [ss]636(b)(1)(A) for consideration of pending motions. Three motions are pending before the Court. Plaintiff has filed a motion for leave to file a first amended complaint (Docket No. 58), and a motion to propound in excess of thirty requests for admission (Docket No. 57). Defendant has filed a motion to terminate discovery (Docket No. 61). Both parties have filed appropriate responses and replies (Docket Nos. 61, 64, 65).

The first motion addressed is the plaintiff's motion for leave to file an amended complaint. Plaintiff moves to amend his complaint for racial discrimination under Title VII, 42 U.S.C. [ss] 2000e, et seq. to add a claim for

emotional and mental injuries pursuant to the Kentucky Civil Rights Act, K.R.S. Chapter 344 (Docket No. 58. p. 1). Plaintiff argues that this amendment is simply to add a damage remedy and does not affect liability issues or prejudice the defendant in any fashion. Defendant responds that the plaintiff's motion to amend is untimely, highly prejudicial, and futile since the plaintiff's potential claim is time-barred by the five year statute of limitations (Docket No. 61, pp. 10-11, 16-27).

Plaintiff's motion is governed by Fed.R.Civ.P. 15(a). Rule 15 permits a party to amend its pleadings by leave of court, or by written consent, once a responsive pleading has been filed "and leave shall be freely given when justice so requires" Fed.R.Civ.P. 15(a) (West 1992). The Supreme Court has held in Foman v. Davis, 371 U.S. 178, 182 (1962), that leave to amend should be liberally granted in the absence of undue delay, bad faith, undue prejudice, or futility of amendment.

There is no question that the present suit is an old one. The initial complaint was filed on January 12, 1987, more than six years ago. Plaintiff's motion to amend was not filed until five years and three months later in April of 1992. The motion to amend contains no explanation for this extraordinary delay. Further, the amended complaint does not contain any factual allegations that were not known to the plaintiff when the

original complaint was filed in 1987. These facts alone suggest undue delay.

Plaintiff argues in his reply that prior to Mitchell v. Seaboard Systems, Inc., 883 F.2d 451 (6th Cir. 1989), the courts of this district held that general compensatory damages were not recoverable under K.R.S. 344.450 See Ellis v. The Logan Co., 543 F. Supp. 586 (W.D. Ky, 1982); Berry v. General Elec. Co., 541 F. Supp. 800 (W.D. Ky. 1982). Plaintiff concludes that this "unsettled and confusing state of the law" explains the delay in filing (Docket No. 64, pp. 2-4).

The Magistrate Judge disagrees for several reasons. First, accepting this argument on its face, the plaintiff still delayed until three years after the Mitchell decision before filing his motion to amend. No explanation is offered for this delay, except the speculation that the plaintiff's prior attorney (his second counsel) was probably unaware of Mitchell. Such reasoning merely reinforces a lack of due diligence and is hardly persuasive.

Plaintiff's position is further undercut by his arguments regarding notice. Plaintiff concedes at Section III of his Reply (Docket No. 64, pp. 4-5), that his prior attorney, the Honorable William Allison, in his 1988 correspondence to the defendant's counsel stated that the plaintiff's claims could only be settled upon payment of "damages for pain and suffering." Thus,

regardless of prior counsel's ignorance of Mitchell, it is clear that the plaintiff intended since at least April of 1988 to seek recovery for emotional injuries, but did not attempt to amend the complaint to seek such recovery until for years later.

While it is true that the mere passage of time will not justify denying leave to amend, delay may become fatal with the passage of time. Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981). Where there is an apparent lack of due diligence, the burden falls on the movant to justify the delay. Daves v. Payless Cashways, Inc., 661, F.2d 1022, 1025 (5th Cir. 1981). Unjustified delay coupled with resulting prejudice will warrant denying leaves to amend pursuant to Rule 15(a). See Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 625 (7th Cir. 1987); Ross v. Houston Independent School Dist., 699 F.2d 218, 228 (5th Cir. 1983). Clearly, the delay was undue.

The Magistrate Judge must now decide whether the defendant will be unfairly prejudiced. Plaintiff's amended complaint seeks to recover damages for emotional injuries, which include humiliation, distress, and mental anguish. Defendant argues that if the motion is granted, it will be substantially prejudiced by the burden of taking additional discovery on the plaintiff's mental state long after the relevant facts occurred (Docket No. 61,

pp. 21-23). Defendant points out that extensive discovery has already been taken, and that at least two of the key witness, who may have testimony concerning the plaintiff's prior mental state, are no longer in the employ of the defendant (Id.).

The Magistrate Judge agrees. Permitting the plaintiff to raise the issue of his mental state at this point in the litigation would be unfairly prejudicial to the defendant. First, it would require redeposing at least five witness, the plaintiff and four of his co-workers. Second, the defendant would be denied the benefit of any contemporaneous psychological or psychiatric evaluation which it would otherwise be entitled to have pursuant to Fed.R.Civ.P. 35. Finally, even were the relevant time period limited to the early 1980's, it is clear that the memories of the relevant witnesses concerning the plaintiff's demeanor would now be long faded. Accordingly, the Magistrate Judge concludes that not only is the plaintiff's delay unjustified, such delay unfairly prejudices the defendant. See Clark v. Township of Falls, 890 F.2d 611, 624 (3rd Cir. 1989); Parker v. Joe Lujan Enter., Inc., 848 F.2d 118, 121 (11th Cir. 1988). Plaintiff's motion for leave to file an amended complaint is **DENIED**.

The Magistrate Judge next turns to the motion of the defendant to terminate discovery (Docket No. 61, pp. 27-36). Defendant's motion to terminate is the

result of the plaintiff's motion for leave propound in excess of thirty interrogatories (Docket No. 57). These interrogatories relate to the plaintiff's ongoing attempts to obtain employee performance evaluations, summaries, appraisals, and "bluebooks" relating to certain of the plaintiff's Caucasian co-workers in the defendant's research and development department. Plaintiff argues that these evaluation documents are essential to his claim; that as a Black Ph.D. employee, he was denied promotional opportunities accorded to less qualified Caucasian Ph.D. employees and employees with less education (Docket No. 65). Defendant argues that the prior order of the Magistrate Judge entered on November, 1990, has resolved this dispute, and that it has produced all relevant, non-privileged documents that relate to the plaintiff's prior two sets of interrogatories and request for production (Docket No. 61, pp. 27-36).

Upon consideration of the parties' arguments and exhibits, the Magistrate Judge concludes that the plaintiff's motion to propound in excess of thirty requests for admission is **GRANTED**. The motion of the defendant to terminate discovery is **DENIED**. The scope of discovery in general, and in Title VII actions, is broad. Title VII plaintiffs are entitled to that information needed to establish employment discrimination where it exists. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431 (D.C. Pa. 1978). The broad scope of discovery is

limited only by relevance and by burdensomeness. Milner v. Nat'l. School of Health Tech., 78 F.R.D. 628 (D.C. Pa. 1977).

Although the present suit is longstanding, the parties' dispute over the production of the requested personnel records remains unresolved. The Court's prior order of November 30, 1990, did not address the issue, but relates only to the plaintiff's own personnel records, rather than those of his co-workers within the R&D department. This is confirmed by the plaintiff's status report of June 12, 1991, which, from its outset, is directed to the "lack of court ruling on all elements of plaintiff's motion to compel discovery." (Docket No. 46, p. 1), original emphasis). Thus, the Magistrate Judge is not revisiting a "non-issue that has been previously ruled on."

The history of this litigation strongly suggests that the requested documents do exist, and that the defendant has knowingly refused to produced them in violation of its prior negotiated agreement with the plaintiff. Defendant's vice-president and custodian of personnel files, Robert Cherundolo, testified that:

> Whatever forms were completed, we have them .. .. No forms have been destroyed. Whether I call[ed] it the right name or not, they're in the

> employee personnel file, bluebook file, or in our records warehouse or what have you. There is no reason to destroy any files that reflect the performance of an individual.

It is apparent that the requested personnel performance documents of the Caucasian Ph.D.'s in the R&D department (Drs. Ruf, Bailey, Wagener, Maisch, Weber, Br[o]sky, Wolfram, and Baldwin) do exist, and are in the possession of the defendant, as admitted by the testimony of its vice-president. Plaintiff is plainly entitled to these documents and similar documents relating to the Caucasian co-workers with master's or bachelor's degrees (Coffey, Panek, Scalf, Sanders, and Bosworth). The critical nature of the documents, and the fact that they were not requested until the plaintiff's second set of interrogatories and requests on April 11, 1991, (after the November 30, 1990, order) underscores the meritless nature of the defendant's request to terminate discovery.

Defendant shall serve on the plaintiff within thirty (30) days of the date of entry of this order its answers to requests for admission. Plaintiff shall have twenty (20) days thereafter to file appropriate motions, if any, relating to the documents at issue. The time for response and reply to any such motions by the plaintiff shall be governed by Joint Local Rule 6.

IT IS SO ORDERED THIS 2ND DAY OF FEBRUARY, 1993.

"/s/ C. Gambill

C. Cleveland Gambill
United States
Magistrate Judge

Copies to:
Counsel of Record

ENTERED
FEB 3 1993

jesse w. grider,
clerk
by
deputy clerk

"/s/ L. Grimes

APPENDIX A-4

UNITED STATED DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN, Ph.D.
PLAINTIFF

vs. CIVIL ACTION NO.
C87-0022-L(M)

JOSEPH E. SEAGRAM & SONS, INC.
DEFENDANT

ORDER

This matter is before the Magistrate Judge for consideration of pending motions. Plaintiff has filed a series of motion, including: (1) a motion for reconsideration of the prior order denying leave to file an amended complaint; (2) a second motion to compel discovery; (3) a motion to propound in excess of 30 interrogatories; and (4) a third motion to compel discovery (Docket Nos. 76, 82, 92, 93). Defendant has responded (Docket Nos. 86, 87, 94). Plaintiff has replied (Docket Nos. 90, 95).

Turning to the plaintiff's first motion, the Magistrate Judge concludes that the plaintiff has offered no substantial reason to justify amending the February 3, 1993, order which denied the plaintiff's motion to amend (Docket

No. 77). First, the plaintiff's motion for reconsideration in untimely. A party may serve and file objections to the nondispositive order of a magistrate judge within ten days after being served with a copy of the order. Fed.R.Civ. P. 72(a). Beyond this time limit, "a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made." Id. As noted, the order was entered on February 3, 1993 (Docket No. 77). Allowing three days for service by mail, the ten-day limit of Rule 72a) expired on February 16, 1993. The certificate of service accompanying the plaintiff's motion to reconsider reveals that the motion was not served until March 5, 1993, some seventeen days after the expiration of the time in which to serve and file written objections to the order.

Further, the motion for reconsideration, on its merits, is unpersuasive. Plaintiff complains that the delay in filing its motion to amend is attributable to two factors: (1) the refusal of the plaintiff's prior counsel to timely file a motion to amend, contrary to the plaintiff's request; and (2) the alleged refusal of the defendant to timely provide the documentation which would support the plaintiff's claim for mental anguish and emotional injuries.

As the defendant points out, any dispute between the plaintiff and his prior counsel concerning that counsel's refusal to file an amended complaint is a

matter between the plaintiff and that attorney, and is not a basis to grant leave to amend six years after suit was filed. See Link v. Wabash RR Co., 370 U.S. 626 (1962); United States v. Johnson, 752 F.2d 206, 210 (6th Cir. 1985). Further, the nature of the proposed claim is one which would render information concerning it peculiarly within the control of the plaintiff. Plaintiff is best able to know of and document has metal anguish and emotional suffering. The alleged failure of the defendant to timely provide certain employees evaluation records concerning other employees in the research and development department has no bearing the plaintiff's failure to timely file his claim. Plaintiff's motion is DENIED.

The remaining motions filed by the plaintiff all address to one extent or another the parties' ongoing dispute over the production of certain personnel records pertaining to employee job performance, including "bluebook" performance appraisals, performance summary forms, supervisor notes, merit review ratings, development and performance plan and assessment summaries. Plaintiff maintains in his motion that the defendant is knowingly withholding these critical employment records, which the plaintiff maintains are within the control or possession of the defendant as proven by the testimony of [...] its own employees, or representations of its counsel. Defendant argues that it has made

repeated good faith efforts to search all of its document storage facilities in Kentucky and New York to locate the requested documents. Repeated searches, according to the defendant, have failed to reveal any additional documents beyond the 3,000 pages of documents already produced to the plaintiff. Defendant concludes that the plaintiff's present motions are duplicative, oppressive and meritless.

Consideration of these arguments is governed by Fed.R.Civ.P. 34, which governs the production of document and things in the possession, custody or control of a party. A Rule 34 request applies only to parties to the litigation. See 4A Moore's Federal Practice. [ss]34.05[1], pp. 24-28 (Matthew Bender 1993). The documents or things requested must be within the possession, custody or control of a party and already in existence. Id.; Thomas v. Nuss, 353 F.2d 257 (6th Cir. 1965); Knight-Morley Corp. v. Electroline Mfg. Co., 10 F.R.D. 400 (N.D. Ohio 1950). A party who denies under oath that the requested documents exist, or that they are within his custody or control, may not be compelled to produce them. Moore's at [ss]34.17, pp. 34-68. See also In re Aircraft Disaster at Detroit Metro. Airport, 130 F.R.D. 641, 646 (E.D. Mich. 1989); Lachemise Lacoste v. Alligator Co., Inc., 60 F.R.D., 164, 172 (D. Del. 1973).

Defendant relies heavily on this cited case law to insist that the parties' document dispute is at an end. However, the Court remains concerned about the discrepancy in the testimony of Robert Cherundolo, the defendant's Vice-President and custodian of personnel files, and the apparent inability of the defendant to locate a substantial number of its official employee personnel performance files. Cherundolo testified that "whatever forms were completed, we have them...no forms have been destroyed. Whether I call[ed] it the right name or not, they're in the employee personnel file, bluebook file, or in our records warehouse or what have you." Yet the defendant has been unable to locate the personnel performance records for any Caucasian Ph.D. in the research and development department, or the personnel performance records of its research and development employees with Master's or Bachelor's degrees who were promoted to section head within the department. While it is possible, indeed probable, that certain unofficial personnel evaluation forms or notes may have been lost or destroyed in the move from Kentucky to White Plains, New York, the absence of official performance evaluation documentation for the employees included within the above categories is extremely troubling.

To put an end to this issue, the Magistrate Judge, in the exercise of the traditionally broad discretion accorded to the federal courts in discovery

matters, shall **order** the defendant to produce for inspection within thirty (30) days of the date of entry of this order at the offices of its local counsel, Wyatt, Tarrant & Combs, the "personnel records" of the following former or current employees of the defendant: [Ruf]. Bailey, Wagener, Maisch, Weber, Bronsky, Wolfram, Baldwin, Coffey, Panek, Scalf, Sanders, Bosworth, Wathen, Luther and Wang. The personnel records of these individual shall be produced for inspection as they are kept in the usual course of business and shall be organized alphabetically by the Last name of each employee. The term "personnel records" as used includes, but is not limited to including: performance summaries, development reviews, supervisors notes, merit review ratings, position description questionnaires, management incentive plan, performance plan and assessment summaries, "bluebooks." employee personal records, letters of recommendation, promotion summary forms, managerial personnel appraisals, complimentary or disciplinary letters, and any other documents normally maintained in the personnel records of these employees. These records are to be considered strictly confidential and subject to the parties' stipulation of confidentiality. Defendant or its local counsel shall have an employee available to assist the plaintiff's counsel in his review and copying of these records.

In reaching his decision to accord the plaintiff this opportunity for

inspection, the Magistrate Judge has considered the policies underlying the rules of discovery, the respective rights of the parties, the relative financial burden imposed, and the need for a swift end to this continuing dispute. It is hopped that this measure will put an end once and for all to the claims that critical discovery documents are being knowingly with held.

Consideration of the plaintiff's remaining motion for leave to propound in excess of 30 interrogatories, and third motion to compel, shall be held in abeyance pending the defendant's compliance with this order. It is the hope of the Magistrate Judge that such compliance shall put to rest any remaining concerns of the plaintiff, thereby rendering moot his remaining two motions. The Magistrate Judge also notes that the defendant has voluntarily supplemented its response to plaintiff's latest request for admissions. The Magistrate Judge is further hopeful that these supplementary responses will further alleviate the plaintiff's concerns. Finally, the Magistrate Judge is aware that the effect of this order is to extend the previously established discovery deadline of May 1993. The Magistrate Judge considers this result unfortunate, but unavoidable, in view of the parties' dispute over document production.

Date: June 11, 1993

"/s/ C. Gambill"
C. Cleveland Gambill
United States
Magistrate Judge

Copies to:
Counsel of Record

ENTERED
JUN 11 1993

Jesse W. Grider,
Clerk
by: Deputy Clerk
"/s/ G Grimes

APPENDIX A-5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN, Ph.D.
PLAINTIFF

vs. CIVIL ACTION NO.
87-0022-L(M)

JOSEPH E. SEAGRAM & SONS, INC.
DEFENDANT

ORDER

This matter is before the court on several discovery-related motions filed by plaintiff.

The defendant has responded thereto.

IT IS HEREBY ORDERED as follows;

1. Motion for ruling on omissions. (Docket entry #101). Plaintiff's motion for ruling on discovery omissions in essence seeks relying on certain aspects of a previously filed motion to compel. This court has reviewed the matter and determined that the defendant has made a fulsome response to plaintiff's requests. THEREFORE, the motion for ruling on omissions is DENIED;

2. Motion for ruling on pending motions. (Docket entry #102). Plaintiff seeks ruling on two discovery motions

previously held in abeyance. The motion for ruling on pending motions is GRANTED. The motion for leave to propound in excess of 30 interrogatories is DENIED. The motion to compel discovery is DENIED; and

3. Motion for sanctions. (Docket entry #103). Plaintiff requests that this court impose sanctions on defendant for failure to comply with plaintiff's discovery requests. A review of the record convinces this court that the defendant has made every effort to comply with plaintiff's discovery requests and as such, sanctions is inappropriate. Therefore, the motion for sanctions is DENIED.

This 31 day of March, 1994.

"/s/" Ronald E. Meredith

RONALD E. MEREDITH
CHIEF UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

ENTERED
MAR 31 1994
JEFFREY A. APPERSON,
CLERK
BY:
DEPUTY CLERK

APPENDIX A-6

No. 96-5094

UNITED STATES COURT OF APPEALS
FOR SIXTH CIRCUIT

FILED
OCT 31 1996
LEONARD GREEN,
Clerk

JAMES W. COLEMAN, Ph.D.,

Plaintiff-Appellant,

v.

JOSEPH E. SEAGRAM & SONS, INC.,

Defendant-Appellee.

ORDER

Before: GUY, RYAN AND COLE, Circuit Judges.

James W. Coleman, Ph.D., a Kentucky citizen, appeals pro se a judgment for the defendant following a bench trial in this race discrimination in employment action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. [ss]2000e et seq. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit.

Upon examination, this panel unanimously agrees that oral argument is not needed. Fed R. App. P. 34(a).

Coleman sought monetary damages from his former employer, Joseph E. Seagram & Sons, Inc. (Seagram), alleging that he had been discriminated against on the basis of his race and in retaliation for protected activities when he was denied a promotion and constructively discharged. The case remained pending in the district court for nine years, during which the parties conducted voluminous discovery. More that five years after filing the original complaint, Coleman moved to amend his complaint to include a claim for damages for emotional distress under the Kentucky Civil Rights Act. A magistrate judge denied the motion to amend. Although Seagram produced 3000 pages of employment records of Coleman and other employees, Coleman remained convinced that Seagram was withholding records, and filed a number of motions to compel. The district court ultimately determined that Seagram had complied fully with Coleman's discovery requests. Seagram then moved for summary judgment, which the district court granted as to Coleman's claims of constructive discharge and failure to promote. However, the district court then granted Coleman's motion to reconsider the summary judgment on the failure to

promote claim. The case proceeded to a bench trial, following which the district court entered judgment for the defendant. On appeal Coleman reasserts the merits of his claims and also argues that the was denied discovery and that his motion to amend was erroneously denied.

Upon review, we conclude that Coleman has not demonstrated that any of the findings of fact upon which the district court based its judgment for the defendant are clearly erroneous. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). The district court's finding that Coleman had not established a prima facie case of failure to promote is supported by the record. Coleman did not establish that he was rejected for the promotion he sought. Rather, he removed himself from consideration by his resignation. Moreover, even if the failure to immediately promote Coleman were construed as a rejection, Seagram proffered a legitimate business reason for its delay which Coleman did not demonstrate to be a pretext for discrimination. *See Hale v. Cuahoga Co. Welfare Dep't.*, 891 F.2d 604, 606 (6th Cir. 1989). Seagram explained that it waited to fill the position until after its operations were transferred to New York state, because it was not known which personnel would relocate. Coleman

vacillated about the decision to relocate, and ultimately chose to resign and accept the severance package and early retirement. For the same reason, Coleman did not establish a case of retaliation because no adverse employment action was taken. *See Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987). Similarly, Coleman presented no evidence that a reasonable person would have felt that he was constructively discharged under the circumstances. Coleman assumed the worst when he was not immediately promoted. *See Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991).

Finally, we find no abuse of discretion in the district court's ruling on discovery or in the denial of the motion to amend the complaint. *See Plott v. General Motors Corp., Packard Elec. Div.*, 71.3d 1190, 1196 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 1546(1996); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995).

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

"/s/ Leonard Green/ js"

Clerk

APPENDIX A-7

No. 96-5094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 12 1996
LEONARD GREEN,
Clerk

JAMES W. COLEMAN, PH.D.,

Plaintiff-Appellant,

v.

JOSEPH E. SEAGRAM[] & SONS, INC.,

Defendant-Appellee.

O R D E R

BEFORE: GUY, RYAN, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for

rehearing have been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

"/S/" Leonard Green

Leonard Green, Clerk/m